No. 887

Office-Supreme Court, U.S.
FILED
APR 20 1965
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RICHARD J. MURPHY
1225 LaSalle Street Station
Chicago, Illinois 60605
Attorney for Petitioner

April, 1965

No. 887

In the Supreme Court of the United States

OCTOBER TERM, 1964

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

SOUTHERN RAILWAY COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of March 29, 1965 denying the petition for writ of certiorari and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Seventh Circuit in the above-entitled case as prayed for in the petition filed February 8, 1965, herein.

Reasons for Granting Rehearing and Issuing the Writ

1. Since entry of this Court's order of March 29, 1965, the sharp conflict between the decision below and the decisions of this Court in respect to section 1(18) of the Interstate Commerce Act has crystalized. On April 5, 1965, this Court, in *Chicago & Northwestern*

R. Co., v. *Chicago, Milwaukee, St. P. & P. R. Co.*, ... U.S. ....., No. 21 October Term, 1964, reversed the lower court's opinion in *Chicago, Milwaukee, St. P. & P. R. Co.* v. *United States*, 214 F. Supp. 244 (E.D. Wis. 1963), citing *Texas & P. R. Co.* v. *Gulf, C. & S. F. R. Co.*, 270 U.S. 266, 278 (1926).

The decision below in No. 21 held that a 262 foot connecting line between two railroads was not an "extension of lines" requiring a certificate of public convenience and necessity from the Interstate Commerce Commission under section 1(18) of the Act because there was no "invasion of territory served by other railroads" (214 F. Supp. at p. 249). It follows that this Court's citation of the *Texas and P.* case in reversing No. 21 re-emphasizes the invasion of territory test as the crucial consideration in determining whether an operation constitutes an extension of line within the meaning of section 1(18).

In the instant case, the court below held that respondent's operation for a distance of approximately 10.5 miles to serve a mine tipple located 350 feet from petitioner's line of railroad was not an extension of line in spite of the fact that petitioner had served that mine tipple for 6 years before respondent commenced its operation; and in spite of the fact that the Interstate Commerce Commission in authorizing petitioner to build the line of railroad that is 350 feet from the mine tipple found that "there is no other railroad serving the same general territory" *Cleveland, C. C. & St. L. Ry. Construction and Operation*, 228 I.C.C. 461, 462 (1938). Clearly, respondent's operation is an invasion of territory. Clearly the lower court's opinion herein is in conflict with the test set forth in

the *Texas and P.* case and reiterated by this Court in reversing No. 21, October Term, 1964, subsequent to the denial of certiorari herein.

2. The question continues to be one of great practical importance in the interpretation of section 1(18) of the Interstate Commerce Act. The *Texas and P.* holding that invasion of territory is regulated by section 1(18), which test was reapplied by this Court this term, and the *Transit Comm.* v. *United States,* 289 U.S. 121 (1933), holding that under section 1(18) the congressional purpose of regulating extension of a railroad's operations is to be achieved even though the extended railroad operations are not over its own track, deal with a question of large importance in the regulation of railroads. The law on this question, however, is made uncertain by the decision of the court below and the denial of certiorari herein, which denial was followed shortly by the reversal in No. 21, October Term, 1964.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

RICHARD J. MURPHY,
1225 LaSalle St. Station
Chicago, Illinois 60605
Counsel for Petitioner

April, 1965

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58 of the rules of this Court.

.....

Counsel for Petitioner